## JULIANA NETTO v. S. SARAVANAMUTHU

[A.C.J. (Ong J.) February 20, 1959]

[K.L.—Civil Appeal No. 18 of 1958]

*Landlord and Tenant — Arrears of rent — Claim for possession under section 12(1)(a), Control of Rent Ordinance, 1956 — Order under s.12(2).*

Where a claim to possession of premises is made by a landlord under section 12(1)(a) of the Control of Rent Ordinance and he is successful, it then lies on the tenant forthwith to ask for such relief as the Court may think reasonable to grant to him in the circumstances. The Court may then (a) make an absolute order for possession without any qualification, or (b) make such order and suspend its execution for any period not exceeding 6 months from the date of the order, or (c) make possession was given.

In this case the appellant claimed possession of premises of which the respondent was a tenant for arrears of rent under section 12(1)(a) of the Ordinance and the respondent was ordered firstly, to "quit and deliver up vacant possession of the premises at the end of 6 months from this date", and secondly, that he pay the usual rental of $50 per mensem for the said premises until vacant possession was given.

**Held:** the terms of the first part of the order are absolute terms giving the landlord the right to recover effective possession at the end of 6 months, and the second part of the order was merely declaratory of the respondent's obligation to pay his landlord for so long as he choose to remain in possession, but not exceeding 6 months. The condition did not in any way limit or qualify the terms of the first part of the order.

*Cases referred to:—*

(1) *Payne* v. *Cooper* [1958] 1 Q.B. 174; [1957] 3 W.L.R. 741; [1957] 3 All E.R. 335.

(2) *American Economic Laundry* v. *Little* [1951] 1 K.B. 400; [1950] 2 All E.R. 1186.

CIVIL APPEAL.

*K. L. Devaser* for the appellant.

*Chan Hua Eng* for the respondent.

*Cur. Adv. Vult.*

**Ong J.:** This is an appeal against the order of the Magistrate made on 1st July 1958 rescinding an order of the same court made on 2nd December 1957.

The appellant was the plaintiff in Civil Action No. 140 of 1957 and she was claiming against the respondent, her tenant, possession of premises No. 261 Sentul Pasar, Kuala Lumpur, which are premises to which the Control of Rent Ordinance 1956 applies. The claim was made under the provisions of section 12(1)(a) of the Ordinance and on 2nd December, 1957 an order was made in the following terms:

(1) That the Defendant abovenamed do quit and deliver up vacant possession of the premises No. 261, Sentul Pasar, Kuala Lumpur to the Plaintiff at the end of six months from this date.

(2) That the Defendant do pay to the Plaintiff the usual rental of $50 per mensem for the said premises until vacant possession thereof is given.

On 2nd December 1957 the respondent filed notice of appeal against the decision of the Magistrate and one of the grounds of appeal was that the learned Magistrate had failed or failed properly to exercise the discretion vested in him by section 12(2) of the Ordinance. That appeal was heard by Shepherd J. on 23rd May 1958 and dismissed with costs on 6th June 1958. In the result that question was concluded as between the parties, and it became no longer open to the respondent to say that the provisions of subsection (2) of section 12 had not been duly considered by the learned Magistrate when making his order.

Unfortunately, in the course of his judgment the learned Judge, after expressing his view that the learned Magistrate must be taken to have exercised his discretion under subsection (2) of section 12 and to have done so properly, proceeded to express further his views *obiter* on the matter as follows:

"The sub-section permits the court, that is to say, the Magistrate, if he thinks fit, to discharge or rescind his order at any time provided that the condition contained therein (viz., the rental of $50 a month to be paid until the date of recovery) is complied with; and as I made an order extending the period of 6 months by a further period of one month in the exercise of any inherent jurisdiction, the appellant has time to apply to the Magistrate accordingly."

With the greatest respect to the learned Judge I am unable to agree with his interpretation of the terms of the order. I would also observe that if he gave the extension of one month in order to allow the application to be made to the Magistrate in time it was ineffective since the extended period, being in all 7 months from 2nd December 1957, had already expired before the judgment was delivered on 6th June 1958, and the respondent's application was not filed until 12th June 1958. The point, however, is of no consequence in view of what I think should be the proper interpretation of the order of 2nd December 1957.

Section 12(2) of the Control of Rent Ordinance, 1956 reads as follows:

"Where any order or judgment for the recovery of possession of any premises is made or given on the grounds of the non-payment of rent the Court may if it thinks it reasonable so to do stay or suspend execution on any such order or judgment or postpone the date of possession for such period not exceeding six months from the date of the order or judgment as it thinks fit and subject to such conditions in regard to payment by the tenant of arrears of rent, rent, costs and otherwise as the Court thinks fit, and, if such conditions are complied with, the Court may, if it thinks fit, discharge or rescind any such order or judgment."

Where a claim to possession of premises is made by a landlord under section 12(1)(a) and he is successful, it then lies on the tenant forthwith to ask for such relief as the court may think reasonable to grant to him in the circumstances. The court may then (a) make an absolute order for possession without any qualification, or (b) make such order and suspend its execution for any period not exceeding 6 months from the date of the order, or (c) make a conditional order, for a specimen of which see Form 138 of the County Court Practice 1957 to which reference was made in *Payne* v. *Cooper*[1].

The order of 2nd December 1957 in my opinion comes under the second category. The respondent was ordered firstly, to "quit and deliver up vacant possession of the premises at the end of 6 months from this date" — in terms which are absolute — and secondly, that he pay the usual rental of $50 per mensem for the said premises until vacant possession was given up. It seems to me a fallacy to treat the second part of the order as a condition. The sum of $50 was the usual rent, and it is obvious that if the tenant sought an indulgence by having the order for possession suspended he could not have had such indulgence at the expense of the landlord. Moreover, it will be observed that the respondent had to pay the $50 per month for the premises "until vacant possession thereof is given", and if these words mean anything, they again emphasise that possession was to be given. If the respondent was able to move out earlier his liability *pro tanto* would be at an end. How then can this part of the order be construed as giving the respondent a right to come to the court again at the end of the 6 months and say that because he had paid all rents as they fell due the whole order should be discharged? The condition, assuming it was a condition, was merely declaratory of the respondent's obligation to pay his landlord for so long as he chose to remain in possession, but not exceeding 6 months. It was implicit that the respondent need not pay at any time after he surrendered possession, but it was explicit that possession must be surrendered at the end of the stipulated period. The condition did not in any way limit or qualify the terms of the first part of the order which in absolute terms gave the landlord the right to recover effective possession at the end of 6 months.

Counsel have referred to *Payne* v. *Cooper* in which case section 4(2) of the Rent & Mortgage Interest Restrictions Act, 1923, fell to be considered. Section 4(2) reads as follows:

"At the time of the application for or the making or giving of any order or judgment for the recovery of possession of any such dwelling-house, or for the ejectment of a tenant therefrom, or in the case of any such order or judgment which has been made or given, whether before or after the passing of this Act, and not executed at any subsequent time, the court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits and otherwise as the court thinks fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment."

It clearly is not in *pari materia* with our section 12(2). Under the latter, if a conditional order is sought, the tenant has to ask for it before the order is made, or it will be too late. The relevant provision of the English Act, however, provides otherwise. In *Payne* v. *Cooper* at p. 747 when referring to the case of *American Economic Laundry* v. *Little*[2] Lord Evershed M.R. said: "I did there express the view (and Birkett and Romer L. JJ., who were sitting with me, in no way dissented from it) that the terms of section 4(2) comprehended the power to superimpose on an absolute order an order postponing possession on condition — in other words, power to convert an absolute order into a conditional order, with the consequence that the order, if the conditions were satisfied, could then be discharged." The difference, therefore, between the provisions of the English Law and our Law is so clear as to admit of no argument.

Since in my judgment the order of 2nd December 1957 was an absolute order, it follows that the learned Magistrate who heard the respondent's application on 1st July 1957 had no jurisdiction to rescind that order. This, however, must be said in fairness to the learned Magistrate that he must have felt himself bound by the views expressed by His Lordship, and consequently he appeared to have thought that subsection (2) of section 12 gave him a discretion regardless of whether the order sought to be rescinded was an absolute or a conditional order. It is a perfectly elementary proposition that a Magistrate may in the exercise of his discretion properly make an absolute order for possession as well as a conditional one, and if an absolute order is liable nevertheless to be set aside on a subsequent application, then his powers to make an absolute order are completely nullified and one Magistrate may in effect sit in appeal on a final order of another Magistrate.

The appeal is allowed and the order of the learned Magistrate rescinding the order of 2nd December 1957 is set aside. The earlier order therefore stands. The appellant will have the costs of this appeal as well as the costs of the proceedings in the court below.

*Appeal allowed.*

Solicitors: *K. L. Devaser & Co.; Shearn, Delamore & Co.*

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## CHEW BOON EE v. L. RAMANATHAN CHETTIAR & ORS.

**[J.C. (Lord Radcliffe, Lord Jenkins and the Rt. Hon. L. M. D. de Silva) June 1, 1959]**

**[Privy Council Appeal No. 21 of 1957]**

*Court of Appeal — Fact, finding of — Appeal from Supreme Court — Witness — Credibility of — Principles which should guide Court of Appeal dealing with findings of fact by trial Court.*

A Court of Appeal has no doubt jurisdiction to reverse a trial Court on all questions of fact and law but it is only in rare cases that an appeal Court could be satisfied that the trial Judge has reached a wrong decision about the credibility of a witness. The principles laid down in *Benmax* v. *Austin Motor Co. Ltd.* (1) applied.

In this case the appeal relates to a declaration as to the ownership of certain shares purchased during the Japanese occupation. The trial Judge accepted the plaintiff's evidence that he had purchased the shares, but the Court of Appeal reversed the finding of fact and allowed the appeal. Upon a review of the case as a whole their Lordships of the Judicial Committee could